No. 97-1875

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

A.J. WREN and JERRY WREN,

Petitioners,

vs.

JIM TOWE and JAY NORRIS,

Respondents.

On Petition for Wrt of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT JAY NORRIS

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QUESTION PRESENTED

Whether the Court of Appeals properly reversed the district court's denial of the defendants' motion for summary judgment on the basis of qualified immunity and remanded the case to the district court to render judgment in favor of the defendants, granting them qualified immunity.

PARTIES TO THE PROCEEDING

The petition accurately lists the parties to the proceeding, except as to the following addition:

W. Wendell Hall, *Counsel for Defendant-Respondent*

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STATEMENT OF THE CASE

Jay Norris, a member of the International Association of Auto Theft Investigators and the Texas Association of Vehicle Theft Investigators, has been a member of the Dallas FBI Auto Theft Task Force since mid-1994. Prior to this, he retired from the Louisiana State Police as a Master Trooper in 1993 with credit for more than twenty years of service. Norris was a commissioned Special Ranger at the time the investigation began and at the time of Towe's seizure of the Wrens' vehicle.[1] He has taught various courses in auto theft, prevention and investigation at the Louisiana State Police Academy and at various other academies throughout Louisiana.

In January 1995, Norris inspected a truck in the parking lot while instructing a course on basic auto theft at the Arlington Regional Police Academy. The truck did not have a dashboard vehicle identification number ("VIN") on it and a computer database search of the truck indicated that although it was registered to a dealer, it did not have dealer plates, was not on a sales lot, and did not have a for sale sign on it. Absence of a dashboard vehicle identification number suggested possible criminal activity. Through a database inquiry of the license plates, Norris obtained registration information for the truck, as well as information that the truck was totaled and/or salvaged at one point. However, the truck looked almost brand new.

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1. "A special ranger is subject to the orders of the [Texas Public Safety C]ommission and the governor for special duty to the same extent as other" Texas Department of Public Safety Officers. TEX. GOVT. CODE § 411.023(b) (Vernon's 1990). Article 2.12(4) of the Texas Code of Criminal Procedure states that "rangers and officers commissioned by the Public Safety Commission and the Director of the Department of Public Safety" are peace officers. TEX. CODE OF CRIM. PROC. art. 2.12(4) (Vernon 1990). As defined by statute, Norris is a peace officer. He also was certified under the Texas Commission on Law Enforcement Officer Standards — Education. *See* TEX. GOVT. CODE §§ 415.001-415.123 (Vernon's 1990).

Norris then contacted the original owners of the vehicle, the McGees, who explained that their truck had been stolen and burned. Norris also obtained from the McGees' insurance company a copy of the claim file which confirmed that this vehicle had been stolen, burned and totaled. Texas Department of Public Safety Sgt. Walter Degner was then asked to inspect the truck. Degner was advised that Texas Custom Trucks was in the chain of title of this vehicle. Degner was familiar with Texas Custom Trucks and was aware that its activities had been under review by members of the Dallas FBI Auto Theft Task Force. From other members of the Dallas FBI Auto Theft Task Force, it was learned that Texas Custom Trucks was Randy Brown's business name. Brown was a narcotics informant for Lt. Paul Pothen of the DeSoto, Texas Police Department. Lt. Pothen was a narcotics officer whose signature appeared on the Texas Department of Transportation Form 68-A which certified that the vehicle was a legitimate, reconditioned vehicle. However, the absence of a VIN plate and the peculiar circumstances surrounding the Form 68-A led Norris to continue his investigation. DOT Form 61, which Norris located on this vehicle, revealed that the cab of the truck at one time belonged to William Searcy.

Searcy told Norris that his deceased father had left him a 1989 Chevrolet truck, which he later wrecked. GMAC was the lien holder on this vehicle. Searcy said he had removed the dashboard VIN plate from the cab. He described in detail extensive damage to the undercarriage of the cab with the roof and driver's side door having been caved in almost completely. He also stated that the doors of the truck were sold to a third party whose name he could not remember. Searcy further stated that GMAC had repossessed what was left of the truck, and he had lost it all.

Conversations with GMAC representatives did not confirm this story. In fact, GMAC stated that they had not repossessed

this vehicle and that their lien to secure payment of the vehicle was never paid. From this, Norris determined that Searcy may have sold and/or transferred secured property in violation of TEX. PEN. CODE § 31.03.

Searcy also gave Norris certain "identifiers" to confirm that what he might be looking for was the cab which Searcy had at one time owned. Searcy explained and drew a diagram for Norris depicting the locations of marker lights on the top front of the cab and opera lights he had installed at the side window of the cab. In a subsequent conversation, Searcy confirmed what he initially stated except that he was uncertain about removing the dashboard VIN tag.

On March 16, 1995, Norris and Texas Department of Public Safety Sgt. Jim Towe located the current owner of the truck, Jennifer Wren. Mrs. Wren confirmed that she was the owner of the vehicle and consented to an inspection. Prior to the inspection, Mrs. Wren called her husband, who also consented to an inspection, provided that it was made somewhere other than the parking lot of his wife's employer. An inspection of the truck revealed:

- The vehicle had no evidence of ever having marker or opera lights where Mr. Searcy said he had them on his cab;

- There was no evidence of fastener holes where the clearance and opera lights described by Searcy should have been located;

- The VIN tag on the driver's door matched the VIN for Searcy's cab, which was confusing, since Searcy informed Norris that he had sold the doors independent of the cab;

- Contrary to what Searcy had related, there was no evidence that the vehicle had ever sustained serious roof or undercarriage damage; it was evident, however, that the driver's door had been straightened and repaired;

- The VIN sticker, usually found in a vehicle's glove compartment, was missing;

- Throughout the vehicle, numerous parts were observed with older year dates than that of the vehicle; another factor indicating the possibility of illegal activity. R. 79-80.

Article 6687-1 § 49(c) of the Texas Revised Civil Statutes (now codified at Section 501.158 of the Texas Transportation Code) authorizes a peace officer to seize a vehicle if the officer has probable cause to believe that the vehicle or part of the vehicle has had the serial number removed, altered or obliterated. In addition, Norris and Towe did not find damage to the truck consistent with the damage reported by Searcy, nor were they able to confirm an identification using the light "identifiers" given by Searcy. It appeared, at this inspection, that the cab in question was not Searcy's cab, although the title trail reflected that it should be. Moreover, it appeared that the Texas DOT Form 68-A was executed under suspicious circumstances. A narcotics officer (not an auto theft investigator) signed the document for his informant. Towe agreed that further investigation was necessary and that seizure of the vehicle for that purpose would be appropriate under article 6687-1 § 49(c) (now codified at TEX. TRANS. CODE § 501.158) and TEX. CODE OF CRIM. PROC. art. 47.01 *et seq*. After more than two months of investigation, Sgt. Towe actually "seized the vehicle" in the name of the Dallas FBI Auto Theft Task Force and gave the Wrens a receipt for the seized truck. Pursuant to article 47.03,

Defendant Jim Towe filed a schedule for the Wrens' truck on the day of its seizure.

Several days after the seizure, Norris and Towe again examined the vehicle and were able to determine that the vehicle had been "de-identified". The inspection was to search for confidential VINs placed on component parts by manufacturers for use by law enforcement. Some of the confidential VINs placed were removed or obliterated which was inconsistent with a legitimate rebuild. This gave the defendants additional reasons to believe that the vehicle, or at least parts of it, were stolen.

Pursuant to Texas Code of Criminal Procedure article 47.01 *et seq.*, a hearing was held before Magistrate Roy Kurbin concerning the truck. Officers Norris and Towe and expert Michael Greer testified that probable cause supported seizure of the Wrens' truck and that law enforcement's actions were objectively reasonable and did not violate clearly established law. The Wrens did not controvert or dispute this direct testimony. Similarly, it is undisputed that the cab of the Wren vehicle was taken from Searcy's truck (Searcy purchased the truck from his father by agreeing to take over the payments to GMAC). GMAC held the lien on the truck. It is undisputed that Searcy wrecked the truck and later sold the cab and other parts of the truck to Donnie Thomas. Norris spoke to GMAC concerning the Searcy vehicle and was advised their lien was never paid. From this, Norris determined that Searcy may have sold and/or transferred secured property in violation of TEX. PEN. CODE § 31.03. These facts were not controverted.

At the hearing, a private investigator appeared on behalf of the Wrens and produced pictures of Searcy's truck. From the pictures it was evident that the damage depicted was not consistent with what Searcy had described to Norris. Following examination of these pictures, Norris conducted another

examination of the vehicle and was able to locate the details depicted in the pictures. Following this examination, the Dallas FBI Auto Theft Task Force confirmed that the cab probably was Searcy's.

After hearing the evidence, including the Wrens' story, Magistrate Kurbin awarded the vehicle to the Dallas FBI Auto Theft Task Force pursuant to article 47.01a(b) (providing that if probable cause exists to believe that the property was acquired by theft or by another manner that makes its acquisition an offense and the identity of the actual owner of the property cannot be determined, the court shall order a peace officer to deliver the property to a government agency for official purposes). The Wrens appealed to the Tarrant County Court at Law pursuant to article 47.12(b). Subsequently, an agreed Order was signed returning the truck to the Wrens.

The Wrens later sued Norris alleging that he acted under color of law in allegedly violating their constitutional rights. It is undisputed that all actions taken by Norris were done as a member of the Dallas FBI Auto Theft Task Force. Consequently, Norris is a "government official" for purposes of qualified immunity.

REASONS FOR DENYING THE WRIT

Qualified immunity

> shields government officials performing discretionary functions from liability unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known.

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). *Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994). Qualified immunity

is an immunity from suit, not simply a defense to liability. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1995). The purpose of qualified immunity is to shield law enforcement officers from the burdens of defending lawsuits which arise from the good-faith performance of their duties. *Hunter v. Bryant*, 502 U.S. 224, 227-28 (1991). It protects government officials "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990) (citing *Anderson*, 483 U.S. at 638). Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 241 (1986). Thus, if reasonable public officials could differ on the legality of a defendant's actions, the defendant is entitled to immunity from suit. *Pfannstiel*, 918 F.2d at 1183. Accordingly, the issue of qualified immunity should be resolved at the earliest stage on the basis of the pleadings and limited discovery. *Id.*

The heart of the Wrens' complaint is that they believe that their perception of the facts at the time of the seizure should control the outcome of the defendant's motion for summary judgment based upon qualified immunity. The Wrens argue at length as to what they believe the facts demonstrated at the time of the seizure of the truck. That is not the test. Rather, the court must inquire into the "objective legal reasonableness" of an officer's actions. *Behrens v. Pelletier*, 516 U.S. 299, 306 (1996). As this Court has stated, it is *the information known at the time of the seizure and the reasonability of the inferences drawn from such information* which is the key. *Hunter v. Bryant*, 502 U.S. 224, 27-28 (1991); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987).

I.

THE WRENS WRONGLY COMPLAIN THAT ACTUAL PROBABLE CAUSE IS THE TEST.

As the Court of Appeals noted, the existence of probable cause is not the appropriate issue when determining whether qualified immunity is applicable. The issue is whether the conduct of the government official was objectively legally reasonable. *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Law enforcement is not liable if they "reasonably but mistakenly conclude that probable cause is present." *Id.* Consequently, the seizure of the Wrens' truck is deemed "objectively reasonable" unless "there *clearly* was no probable cause at the time the . . . [seizure] was made." *Topp v. Wolkowski*, 994 F.2d 45, 48 (1st Cir. 1993) (emphasis original). Only when there *clearly* was no probable cause is qualified immunity pierced. *Floyd v. Farrell*, 765 F.2d 1, 5 (1st Cir. 1985). The issue simply is whether probable cause was "at least arguable." *Id. See also Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994) (citing and quoting the *Floyd* "arguable" probable cause standard); *Lindsey v. Storey*, 936 F.2d 554, 559 (1991) (adopting an "arguable" reasonable suspicion standard for a *Terry v. Ohio*, 392 U.S. 1 (1968)-type seizure). The reason for the "arguable" probable cause standard is because law enforcement should not always err on the side of caution for fear of being sued. *Hunter v. Bryant*, 502 U.S. at 229.

II.

THE COURT OF APPEALS CORRECTLY HELD THAT THE WRENS' COMPLAINT THAT THE SEARCH WAS ILLEGAL DOES NOT END THE INQUIRY.

The Court of Appeals correctly held that the district court erred in concluding that because probable cause apparently was lacking it "[would] not consider any evidence gathered during

the search to justify the reasonableness of the seizure." The court noted that the Supreme Court has never applied the exclusionary rule to state or federal civil cases. Pet. App. at 8 (citing *City of Waco v. Bridges*, 710 F.2d 220, 225 (5th Cir. 1983)). The Court of Appeals observed:

> The rationale behind the exclusionary rule is "to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved," and application of the rule "is restricted to those areas where its remedial objectives are thought to be most efficaciously served."

Pet. App. at 9 (quoting *United States v. Janis*, 428 U.S. 433, 446-47 (1976) (citation omitted)). Accordingly, based on the deterrent rationale and the precedent, the Court of Appeals correctly found that there was no reason to ignore and exclude the evidence found in the truck. Pet. App. at 9. Furthermore, as the court recognized, Texas Transportation Code § 501.158 permits the seizure of a vehicle with a missing VIN sticker without a warrant. Consequently, the law does not require the exclusion of evidence because of a lack of a warrant. Pet. App. at 9.

Based upon the information known before and after the search of the truck, the evidence is undisputed that Norris' belief that something illegal was happening was reasonable. As this Court has stated, it is *the information known at the time of the seizure and the reasonability of the inferences drawn from such information* which is the key. *Hunter v. Bryant*, 502 U.S. 224, 27-28 (1991); *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). Again, the issue is not whether Norris had probable cause to seize the truck. Pet. App. at 11.

III.

AFTER AN EVIDENTIARY HEARING, A MAGISTRATE FOUND PROBABLE CAUSE TO SEIZE THE TRUCK.

A magistrate's determination that probable cause existed is entitled to great deference and should be sustained even if the determination is doubtful or marginal. *United States v. Fooladi*, 703 F.2d 180, 183-84 (5th Cir. 1983). Furthermore,

> where the state affords an opportunity for an accused [or an interested person as defined by article 47.01a] to contest probable cause at a preliminary hearing and the accused does so, a finding of probable cause by the examining magistrate or state judge should foreclose relitigation of that finding in a subsequent § 1983 action.

Coogan v. City of Wixom, 820 F.2d 170, 175 (6th Cir. 1987). It is undisputed that the Wrens as well as their private investigator were present and heard at the April 14, 1995 hearing. Nevertheless, Magistrate Kurbin found probable cause and awarded the vehicle to the F.B.I. Task Force. "[P]roof of the actual existence of probable cause is an absolute bar to the 1983 action [regardless] of the lack of good faith of the arresting police officer." *Williams v. Kobel*, 789 F.2d 463, 470 (7th Cir. 1986) (quoting *Moore v. Marketplace Rest. Inc.*, 754 F.2d 1336, 1344 n.10 (7th Cir. 1985)); *see also Hubbert v. City of Moore, Oklahoma*, 923 F.2d 769, 773 (10th Cir. 1991) (explaining that when probable cause is fully and fairly litigated at a preliminary hearing or an examining trial, it cannot be relitigated in a subsequent § 1983 action).

After an evidentiary hearing at which all parties were present and heard, Magistrate Kurbin found probable cause and properly

awarded the vehicle to the Dallas F.B.I. Auto Theft Task Force. The district court erred in failing to give this determination the great deference to which it is entitled. The district court further erred in failing to recognize that probable cause already was determined after an evidentiary hearing pursuant to article 47.01a of the Texas Code of Criminal Procedure. Because probable cause was found after an evidentiary hearing, it cannot be relitigated in this § 1983 action. At the very least, Magistrate Kurbin's finding of probable cause means that the existence of probable cause at the time of seizure is arguable. Consequently, Norris is entitled to immunity from this suit on the basis of qualified immunity.

IV.

THE DISTRICT COURT ERRONEOUSLY RELIED ON *BIGFORD II*.

In concluding that probable cause "appeared" to be lacking, the district court relied upon *Bigford v. Taylor*, 834 F.2d 1213 (5th Cir.), *cert. denied*, 488 U.S. 851 (1988) (*Bigford II*). In *Bigford II*, law enforcement officers seized a truck and the owner of the truck filed a civil rights claim. The suspicions of the sheriff's deputy turned out to be unjustified. Yet, at the time the deputy cited the following reasons to support his suspicions: the Federal Inspection Safety sticker was missing from the door, the rivets affixing the VIN plate to the dash appeared to be tampered with, the truck's body did not appear to match its frame, and the he could not find the VIN stamped on the engine. *Id.* at 1215-16. Further, the deputy used a computer database and found that the truck was never listed as stolen. Also, the plaintiff established a clear chain of title from the original owner. Nevertheless, the truck was seized, held in an impound lot for three years, and then destroyed by a hurricane. *Id.* at 1216-17. The Court of Appeals found that the plaintiff's rights were

violated, that no probable cause existed, and remanded the case. *Id.* at 1223. Erroneously relying on *Bigford II*, the district court stated that "seizure based *solely* on a missing VIN is objectively unreasonable." (emphasis added).

As the Court of Appeals noted, in *Bigford v. Taylor*, 896 F.2d 972 (5th Cir. 1990) ("*Bigford III*"), the court undertook the second part of the analysis and examined the issue of qualified immunity. In *Bigford II*, the court did not expressly discuss qualified immunity. *Bigford III*, 896 F.2d at 975. Observing that the probable cause standards for reasonableness differ from those of qualified immunity, the court concluded that the deputy was entitled to immunity from liability. *Id.* at 975.

Unlike the deputy in *Bigford III* who was entitled to qualified immunity, Norris had far more reasons to be suspicious of the nature of ownership of the Wrens' truck. As the court pointed out, Norris knew that the VINs were missing, that the truck was registered to a dealer, that the truck's immaculate condition did not match its damage record, that the truck was reported stolen, that the truck was sold with a lien on it, that the Form 68-A was suspicious, and that the truck was linked to an illegal chop shop. Pet App. at 13. While the facts were subsequently explained, at the time of the seizure Norris' suspicion based on the facts was not unreasonable. *Id.* The Court of Appeals correctly found that Norris was entitled to immunity.

CONCLUSION

For the reasons given above, the petition should be denied.

Respectfully submitted,

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